Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND PRUDENTIAL HEALTH CARE PLAN OF CALIFORNIA, INC.,

Petitioners,

v.

DAVID E. SINTEK, D.D.S.,

Respondent.

On Petition For A Writ of Certiorari To the California Court of Appeal, Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court can order a party to an arbitration agreement that is subject to the Federal Arbitration Act to engage in class-wide arbitration where the agreement does not authorize such a process, given the Act's "principal purpose of ensuring that private arbitration agreements are enforced according to their terms."

PARTIES TO THE PROCEEDING

Petitioners are The Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. Respondent is David E. Sintek, D.D.S., purportedly on behalf of himself and others similarly situated as members of a putative class of dentist-providers participating in a Prudential Dental Maintenance Organization.

RULE 29.6 STATEMENT

The Prudential Insurance Company of America has no parent company, and no publicly held company owns 10% or more of its stock. Prudential Health Care Plan of California, Inc.'s parent corporation is Aetna Health Management, Inc., which is wholly owned by Aetna U.S. Healthcare, Inc., which is wholly owned by Aetna, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal (App. 1a-11a) is not reported. The order of the California Supreme Court denying petitioners' petition for review (App. 12a) is also unreported. The trial court issued two opinions relevant here: an initial opinion in favor of petitioners (App.13a-16a) and a final opinion favoring respondent (App. 17a-18a).

JURISDICTION

The California Court of Appeal entered judgment on March 21, 2000 (App. 1a), and the California Supreme Court denied review on June 21, 2000 (App. 12a). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). This case draws into question the validity of Cal. Civ. Proc. Code § 1281.3 on the ground that it is repugnant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the decision below constitutes both a final decision rejecting that federal law challenge and a final judgment staying arbitration proceedings. See, *e.g.*, *Volt Info. Scis., Inc. v. Leland Stanford Junior Univ.*, 489 U.S. 468, 473 n.4 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

STATUTES INVOLVED

Pertinent sections of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are reproduced at App. 20a-22a. In addition, Cal. Civ. Proc. Code § 1281.3, which authorizes California courts to consolidate arbitration proceedings in certain circumstances, is set forth at App. 23a-24a.

STATEMENT OF THE CASE

This Court has held that the "central purpose" of the Federal Arbitration Act ("FAA") is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'"[1] The Court has, however, never resolved whether this central purpose is impaired if a court orders the parties to engage in classwide arbitration where the arbitration agreement does not authorize such a process. Although the Court undertook to answer that question in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), it concluded that the question was not properly presented there.[2]

The decision below exacerbates a sharp conflict among numerous state and federal appellate courts over the answer to the question that *Southland* could not reach. Seven federal circuits and several state courts have held that the FAA prohibits courts from ordering consolidated arbitration where not provided for in the parties' agreement. The decision below joins one federal circuit and several other state courts in reaching just the opposite conclusion.

This conflict creates immense potential for forum-shopping and races to the courthouse as parties to arbitrable disputes seek favorable forums for orders compelling or prohibiting consolidated arbitration proceedings. The ruling below, and those like it, also will lead to extensive judicial involvement in matters that should be committed to arbitration, will increase costs and delays, and will threaten the finality of arbitration proceedings -- all contrary to intent of the FAA. The Court should therefore grant review.

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[1] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

[2] See *id.* at 3, 8-9 (leaving unresolved the question of "whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process").

A. Trial Court Proceedings.

On January 15, 1998, David E. Sintek filed a class action complaint in California Superior Court against The Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. (collectively, "Prudential"). Sintek alleged that he and a putative class of dentists had contracted with Prudential to participate as providers in Prudential's Dental Maintenance Organization ("DMO"). He further alleged that Prudential had breached a promise that he and other dentists would be paid on a monthly per capita basis for dependent children under the age of three.

Sintek's DMO contract with Prudential contained a broad arbitration provision that compelled arbitration "among the parties hereto with respect to: the making, construction, terms, or interpretation of This Agreement; or the rights of any party hereto; or with respect to any transaction involved." App. 19a. The arbitration provision further required that the arbitration be conducted "in accordance with the commercial arbitration rules of the American Arbitration Association." *Id.*

Accordingly, after Sintek refused to arbitrate his claim, Prudential filed motions to compel Sintek to arbitrate his individual claim and to stay judicial proceedings pending completion of that arbitration. In response, Sintek moved that Prudential be required to engage in classwide arbitration under a California statute, Cal. Civ. Proc. Code § 1281.3, that authorizes a court to order the consolidation of separate arbitration proceedings regardless of the parties' agreement.

The trial court initially concluded that ordering classwide arbitration under state law was precluded by the FAA, and that the California Supreme Court's contrary ruling in *Keating v. Superior Court*, 645 P.2d 1192 (1982), *rev'd in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984), was no longer good law in light of subsequent federal court cases precluding classwide or consolidated arbitration under the FAA where the

parties had not expressly so provided. App. 13a-16a. The trial court subsequently reversed itself, however, and ruled that the FAA did not prevent the court from ordering Prudential to engage in classwide arbitration. App. 17a-18a. It therefore stayed the arbitration between Sintek and Prudential pending class certification proceedings. App. 18a.

B. Appellate Court Proceedings.

Prudential appealed the trial court order to the California Court of Appeal, arguing that consolidation of arbitration proceedings under the California statute would violate the FAA because the arbitration provision in Prudential's contract with Sintek (and other providers) did not authorize classwide or consolidated arbitration. The court treated the appeal as a petition for a writ of mandate and granted review. App. 4a.

The court held that because the parties' contract involved commerce, the arbitration agreement fell within the ambit of the FAA. App. 5a. The court ruled, however, that the FAA did not preempt the trial court's authority under California law to compel classwide arbitration even though such a process is not provided for in the parties' arbitration agreement. First, the court felt that it remained bound by the California Supreme Court's ruling in *Keating*, 645 P.2d at 1206-09, which held that courts can order class arbitration under Cal. Civ. Proc. Code § 1281.3, since this Court's decision reversing *Keating* had not reached that issue. App. 5a-6a. Second, the court held that § 1281.3 does not contravene the FAA even though § 1281.3 applies exclusively to arbitration agreements because it does not actually invalidate such agreements. App. 6a-7a. Finally, relying on *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), the court held that where an arbitration agreement does not explicitly prohibit classwide arbitration, ordering such arbitration does not violate the FAA's command to enforce arbitration agreements according to their terms. App. 8a-9a.

On June 21, 2000, the California Supreme Court *en banc* denied Prudential's petition for review. App. 12a. The trial court has held further proceedings in abeyance pending proceedings in this Court.

REASONS FOR GRANTING THE WRIT

I. Numerous Federal And State Appellate Courts Have Sharply Divided Over The Question Presented Here.

This Court has repeatedly held that the central purpose of the FAA is to require courts -- both federal and state -- to enforce arbitration agreements "according to their terms." See, *e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("[T]he very purpose of the Act was to 'ensure that private agreements to arbitrate are enforced according to their terms.'"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (the "central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms'"); *Volt Info. Scis., Inc.*, 489 U.S. at 478-79 (reciting "Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms").

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court undertook to resolve whether that central purpose of the FAA is impaired when a court orders classwide arbitration where such a process is not authorized by the parties' arbitration agreement. See *id.* at 3. The Court could not do so, however, because the question had not been properly raised below. See *id.* at 8-9. In the intervening years, the federal and state appellate courts have sharply divided on the question. This case properly presents the issue that *Southland* left open, clearly framed by competing opinions on both sides of the issue from both federal and state appellate courts.

A. Decisions Barring Consolidated Arbitration.

Applying this Court's instruction that the FAA's central purpose is to enforce agreements "according to their terms," seven federal circuits and state appellate courts in New York, Alabama, and Delaware have held that the FAA prohibits courts from ordering classwide or consolidated arbitration unless the parties have consented to such a process in their arbitration agreement. Typical is the Seventh Circuit's decision in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), that "absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration." *Id.* at 271. The plaintiffs in *Champ* had argued that because the arbitration agreement was "silent on the issue of class arbitration," imposing class arbitration would be "in accordance with" the agreement. *Id.* at 274. The Seventh Circuit disagreed: "The parties' arbitration agreement makes no mention of class arbitration. For a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275. The court further explained the arbitration agreement's "terms conceivably could consist of consolidated or even class arbitration," but that "[t]he parties here did not include in their agreement an express term providing for class arbitration." *Id.* at 276. Thus, the court held, ordering class arbitration simply would not be "in accordance with" the terms of the parties' agreement and would contravene the FAA.

Similarly, in *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991), the Sixth Circuit held that a court "is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation." Citing this Court's decision in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 219 (1985), the court emphasized that because the FAA's motivation is to enforce the parties' agree-

ment, "a court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly inefficient maintenance of separate proceedings." 951 F.2d at 108.

Likewise, in *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), the Second Circuit considered an agreement that -- like Prudential's contract with Sintek -- provided for arbitration "in accordance with the Rules of the American Arbitration Association." *Id.* at 69. Overruling a contrary prior decision, the court held that a court "cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation." *Id.* at 74. The court explained that "the FAA 'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" *Id.* at 72. Thus, "[i]f contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party." *Id.* at 74.

The Fifth, Eighth, Ninth, and Eleventh Circuits have all reached the same conclusion. In *Del E. Webb Construction v. Richardson Hospital Authority,* 823 F.2d 145, 149-50 (5th Cir. 1987), the Fifth Circuit ruled that the FAA limits courts to considering only "whether there is a written agreement among the parties providing for consolidated arbitration," thus preventing them from otherwise consolidating arbitration proceedings. In *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990), the Eighth Circuit held under the FAA that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings." In *Weyerhauser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984), the Ninth Circuit held that because the FAA requires that an arbitration agreement be

enforced "in accordance with its terms," a court may order consolidated arbitration only if there is "a written agreement providing for consolidated arbitration." And in *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*, 873 F.2d 281, 282 (11th Cir. 1989), the Eleventh Circuit held under the FAA that "[p]arties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in."[3]

Courts in a number of states have reached the same conclusion. In *In re Arbitration between Cullman Ventures, Inc. v. Conk*, 682 N.Y.S.2d 391 (App. Div. 1998), a New York appeals court held that "[u]nder the Federal Arbitration Act, privately negotiated arbitration agreements are to be enforced according to their terms . . . . Hence, courts may not consolidate arbitrations in contravention of the parties' agreement even if consolidation would ensure a more economical proceeding." *Id.* at 395 (citations omitted). Because the parties could "'simply provide for consolidated arbitration'" if they wanted it, the court held that imposing such a process would be contrary to the FAA. *Id.* This ruling accords with the New York Court of Appeals' decision in *In re Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298 (N.Y. 1995), which

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[3] Numerous district court cases are to the same effect, including cases in California. See, *e.g.*, *Hyundai America, Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217, 1219-20 (N.D. Cal. 1998) (noting circuit split, and refusing to compel consolidation under Cal. Civ. Proc. Code § 1281.3 as it would "create in effect a new contract that [the parties] did not make initially"); *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1423-24 (M.D. Ala. 1997) (holding that the FAA disallows class-wide treatment of arbitration when the agreement is silent); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (same); *McCarthy v. Providential Corp.*, No. C 94-0627 FMS, 1994 U.S. Dist. Lexis 10122, *23-27 (N.D. Cal. 1994) (same).

held that the FAA bars a court from ordering expedited arbitration if not provided for in the parties' arbitration agreement. The court explained that

> the primary policy and purpose of the FAA is to "ensure the enforceability, according to their terms, of private agreements to arbitrate." The goal of the statute is not to promote "the expeditious resolution of claims" but to "rigorously enforce" arbitration agreements according to their terms. Accordingly, courts have refused to consolidate related arbitration hearings in the absence of any provision for consolidation in the parties' agreement, even though consolidation would result in a more economical arbitration process . . . . [I]n the absence of an established ground for setting aside a contractual provision . . . a court must enforce the parties' arbitration agreement according to its terms.

Id. at 1302-03 (citations omitted).[4]

In *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998), the Alabama Supreme Court also considered a case in which the FAA preempted state law. *Id.* at 13. Citing the Seventh Circuit's decision in *Champ*, the court held that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration." *Id.* at 20. It therefore "reverse[d] the trial court's order that would have allowed arbitration to proceed on a class-wide basis." *Id.*

Similarly, in *Steinberg v. Prudential-Bache Securities, Inc.*, No. 8173, 1986 Del. Ch. Lexis 417 (1986), the Delaware Chancery Court held, in the context of a case subject to the FAA, that to impose classwide arbitration on a contract that did

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[4] See also, *e.g.*, *Levine v. Advest, Inc.*, 714 A.2d 649, 657-58 (Conn. 1998) (under the FAA, state courts must enforce arbitration agreements according to their terms).

not provide for it "would amount to rewriting the contract." *Id.* at *15. Notably, the contract at issue (again, like the one between Prudential and Sintek) provided for arbitration under the rules of the American Arbitration Association, and the court held that the "contract provides for arbitration under specific and well-established rules that, insofar as this record shows, do not provide for class arbitration." *Id.* The court therefore compelled individual arbitration.[5]

B. Decisions Ordering Consolidated Arbitration.

By contrast, the court below, the First Circuit, and several other state courts have ruled that the FAA does not prohibit courts from consolidating arbitration proceedings even where not provided for in the parties' agreement. In particular, the decision below relied on the First Circuit's decision in *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), which held that "consent is not a prerequisite to ordering consolidation" under the FAA. *Id.* at 5. The First Circuit acknowledged that courts are bound to enforce arbitration agreements "in accordance with [their] terms" (*id.* at 4) but reasoned that "an order not contradicting the contractual terms regarding arbitration is 'in accordance with [those] terms'" (*id.*

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[5] See also, *e.g.*, *Bateman Constr., Inc. v. Haitsuka Bros., Ltd.*, 889 P.2d 58, 64 (Haw. 1995) ("we hold that the circuit had no jurisdiction to consolidate arbitrations where the arbitration agreements are silent as to consolidation"); *Bay County Bldg. Auth. v. Spence Bros.*, 362 N.W.2d 739, 742 (Mich. Ct. App. 1982) (refusing to order consolidated arbitration where agreement required that arbitration be conducted "in accordance with the rules of the American Arbitration Association"); *Pueblo of Laguna v. Cillessen & Son, Inc.*, 682 P.2d 197, 199-200 (N.M. 1984) (same); *S.K. Barnes, Inc. v. Valiquette*, 597 P.2d 941, 943-44 (Wash. Ct. App.) (same), *review denied*, 1979 Wash. Lexis 1642 (1979); *Consolidated Pacific Eng'g v. Greater Anchorage Area Borough Sch. Dist.*, 563 P.2d 252, 255 (Alaska 1977) (same).

at 5). It therefore held that "[t]here is no limitation on the court's power to consolidate contract actions based on the parties' failure affirmatively to agree to consolidation." *Id.* The court recognized that its decision conflicted with other courts to consider the issue but concluded that a party's only right under the FAA is to choose arbitration instead of litigation, not the arbitration procedures themselves. *Id.* at 6 n.5.

Since this Court's decision in *Southland*, several state appellate courts have reached the same conclusion as the First Circuit. In *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 481 A.2d 553, 559, 562-63 (N.J. App. Div. 1984), *aff'd*, 486 A.2d 334 (N.J. 1985), a New Jersey appeals court ruled that, under federal or state law, a court may order consolidated arbitration without a contractual basis for it. Likewise, in *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 864-67 (Pa. Super Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992), a Pennsylvania court held that classwide arbitration relating to an agreement silent on consolidation was appropriate under the FAA.[6] The decision below joins those courts in siding with the First Circuit.[7]

C. These Many Decisions Are Squarely In Conflict.

The court below sought to distinguish the numerous federal circuit court cases cited above by arguing that those decisions are based on § 4 of the FAA, which authorizes a "United States

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[6] See also *Litton Bionetics, Inc. v. Glen Constr. Co.*, 437 A.2d 208, 220 (Md. 1981); *Episcopal Housing Corp. v. Federal Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979).

[7] Before the current case, another California appellate court had also held that the FAA did not prohibit courts from ordering classwide arbitration of disputes even where not authorized by the parties' agreement. See *Blue Cross v. Superior Court*, 67 Cal. App. 4th 42, 65-66 (1998), *review denied*, 1999 Cal. Lexis 245 (1999), *cert. denied*, 527 U.S. 1003 (1999).

district court" to make "an order directing parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4; see App. 5a. That distinction is mistaken and does not undermine the clear conflict on the issue presented here.

First, as shown at pages 8-10 and note 5 above, the decision below conflicts with the decisions of other state courts, including those of New York, Alabama, and Delaware.

Even more fundamentally, the courts' duty to enforce arbitration agreements "according to their terms" does not arise merely under § 4 of the Act. Rather, this duty arises from the Act's "very purpose," which clearly applies to state courts. As shown on page 5 above, this Court has repeatedly held that "the very purpose of the Act was to 'ensure that private agreements to arbitrate are enforced according to their terms,'" and it has done so specifically in cases applying the FAA (and that central purpose) to state courts. See, *e.g.*, *Doctor's Assocs.*, 517 U.S. at 688; *Volt Info. Scis., Inc.*, 489 U.S. at 478-79. Therefore, each of the many state and federal cases cited above in fact addressed the same issue: whether the FAA's central command to enforce arbitration agreements according to their terms permits courts to order classwide or consolidated arbitration absent the agreement of the parties.

Indeed, the relevant circuit court opinions confirm that they rest on the Act's basic purpose, not just a few words in § 4 of the Act. For example, the Eighth Circuit explained that the decisions of the Fifth, Ninth, and Eleventh Circuits relied not only on a particular provision of the FAA, but also "on the Act's purpose of ensuring judicial enforcement of privately made arbitration agreements." *Baesler*, 900 F.2d at 1195. Similarly, the Ninth and Eleventh Circuits explained that their citation of § 4 "comports with the statute's underlying premise that arbitration is a creature of contract, and that '[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the

suit but also the procedure to be used in resolving the dispute.'" *Weyerhauser Co.*, 743 F.2d at 637; *Protective Life Ins. Corp.*, 873 F.2d at 282 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)); see also, *e.g., Government of United Kingdom*, 998 F.2d at 72. And the Sixth Circuit relied solely on the "underlying motivation" of the FAA in reaching its decision. See *American Centennial Ins. Co.*, 951 F.2d at 108.

In sum, the decision below squarely conflicts with numerous federal and state court decisions on the very issue of federal law that this Court left open in *Southland.*

II. Resolution Of The Conflict Is Essential To Prevent Forum-Shopping And Judicial Interference In Arbitrable Disputes.

The prompt resolution of this nationwide conflict is essential for several important reasons.

A. The Conflict Involves An Important And Recurrent Issue.

As the large number of appellate decisions cited above shows, the question whether courts can order classwide or consolidated arbitration arises frequently. The reason is clear. Arbitration agreements are common in a wide range of transactions, and class actions and consolidations are popular formats for plaintiffs seeking to prosecute disputes. Furthermore, both arbitrations and class actions are proliferating. "In the last decade, the use of mediation, arbitration, and other out-of-court settlement options has grown dramatically." American Arbitration Association, *American Arbitration Association 1999 Annual Report* 7 (2000) ("AAA Annual Report"); see also Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 1 (1996) ("Over the past several years, the use of alternative dispute resolution techniques has been growing in significance and popularity.").

In fact, last year alone, some 140,188 cases were filed with the American Arbitration Association -- only one of the bodies dedicated to alternative dispute resolution. See AAA Annual at 7. If even a fraction of the hundreds of thousands of yearly arbitrations reach the courts on class action issues, the courts will be swamped. Now is therefore the appropriate time for the Court to resolve whether courts may order consolidated arbitration without the consent of the parties.

B. The Conflict Will Encourage Forum-Shopping.

Because the FAA applies both to federal and state courts, the existence of conflicting decisions among the different federal circuits and among the various state courts will give litigants both the motive and opportunity for massive forum-shopping -- to the ultimate detriment of the courts, the parties, and the justice system. This potential for forum-shopping is particularly salient because many arbitrable disputes involve separate claimants in multiple states. The existing conflict will encourage plaintiffs' counsel to file suit in the First Circuit or in states like California seeking orders requiring that such disputes be arbitrated on a classwide or consolidated basis.

Indeed, because the FAA grants either party to an arbitration agreement the right to enforce that agreement, this conflict will lead not only to forum-shopping but also to races to the courthouse. Plaintiffs seeking to pursue classwide arbitration will race to secure orders enforcing such arbitration in the First Circuit or states such as California. Meanwhile, defendants seeking to pursue individual arbitration with potential claimants will race to obtain rulings enforcing that kind of arbitration in the other Circuits or states such as New York. In short, the existing conflict will encourage duplicative litigation as parties hurry to secure their desired orders from favorable forums.

One need look no further than California itself for a stark illustration of this point. If a case is in California federal court, the court will refuse to order classwide arbitration under the

California consolidation statute because doing so would "rewrite" the parties' agreement in contravention of the FAA. See, *e.g.*, *Hyundai America, Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217, 1219-20 (N.D. Cal. 1998) (relying on the Ninth Circuit's decision in *Weyerhauser* in so holding). But if the same case is in California state court, the court will hold that ordering classwide arbitration under the California statute would not contravene the FAA -- as the court below held in this case. Not only is that conflict an open invitation to forum-shopping, but it also runs directly contrary to this Court's observation in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), that "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Id.* at 272.

C. The Decision Below Will Result In Extensive Judicial Intrusion In Arbitrable Disputes And Undermine The Goals Of Choosing Arbitration.

If allowed to stand, the decision below (and those like it) will deeply involve courts in arbitrable disputes and will greatly complicate arbitration proceedings -- all contrary to the goals of the FAA. This is because, in many respects, "[c]lass-wide arbitration is a different animal than individual arbitration." *Dickler*, 596 A.2d at 866.

First, as the California Supreme Court has conceded, class-wide arbitration not only requires the court to certify a class and ensure proper notice, but also to "exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement." *Keating*, 645 P.2d at 1209; accord *Dickler*, 596 A.2d at 866. Thus, under the decision below, a dispute that the parties committed to arbitration rather than court would in fact undergo extensive judicial proceedings both at the front end (discovery on class certification, notice, and the class certification proceedings themselves, including appeal of any certifi-

cation order) and at the back end (review of the fairness of any settlement). "Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7.[8] The decision below also will undermine the finality of arbitration proceedings, since they would become subject to collateral attacks by dissatisfied class members, challenging (for example) the sufficiency of notice or the adequacy of class representation. These consequences will impose substantial burdens on the courts and defeat the goals of speed, efficiency, and finality that are the reasons parties choose arbitration.

Second, even apart from judicial intervention, classwide arbitration will be much more complex than individualized arbitration. For example, "[c]lass action rules allow for multiple representatives in cases where individuals feel that the initial representatives are not adequately representing them. An inundation of representatives during arbitration proceedings could hamstring the process through delay and complexity. Disagreement between multiple class representatives could especially complicate the selection of arbitrators." *Dickler*, 596 A.2d at 866; see also Note, *Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?*, 67 Va. L. Rev. 787, 798-99 (1981). As the Alaska Supreme Court has held, such "policy considerations militat[e] against unconsented-to consolidation. A party with a fairly simpl[e] claim might be put [to] considerable additional delay, expense, and substantive prejudice if his claim were arbitrated as part of a complex arbitration with many parties and many issues." *Consolidated Pac. Eng'g, Inc. v. Greater Anchorage Area Borough*, 563 P.2d 252, 255 n.3 (Alaska 1977).

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[8] See also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 22 (1983) (noting "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

III. The Decision Below Misconstrues The FAA.

The decision below contradicts this Court's construction of the FAA in several respects. First, the decision cannot be reconciled with this Court's oft-repeated statement that the principal purpose of the FAA is to require courts to enforce arbitration agreements "according to their terms." See, *e.g.*, *Doctor's Assocs.*, 517 U.S. at 688 ("[T]he very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'"); *Mastrobuono*, 514 U.S. 52, 53-54 (1995); *Volt Info. Scis., Inc.*, 489 U.S. at 478-79. As this Court has held, if a state statute or holding "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" -- that is, if it would "undermine the goals and policies of the FAA" -- then the FAA preempts that state law. *Volt Info. Scis.*, 489 U.S. at 477-78. Thus, the court below erred in failing to find that the California consolidation statute is preempted in this case by the FAA's basic command to enforce arbitration agreements "according to their terms."

Indeed, this Court has held that the FAA's command to enforce arbitration agreements as written extends to the arbitration procedures themselves. In this Court's words, "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which arbitration will be conducted." *Volt Info. Scis, Inc.*, 489 U.S. at 479 (citation omitted); *Mastrobuono*, 514 U.S. at 57; see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal . . . posits not only the situs of suit but also the procedure to be used in resolving the dispute.").

The arbitration agreement at issue here -- like those in many of the cases in which courts have held that ordering classwide

arbitration would contravene the FAA[9] -- calls for arbitration in accordance with the rules of the American Arbitration Association and contains no provision authorizing classwide arbitration. App. 19. The California court's refusal to honor the parties' specification of the rules under which the arbitration will be conducted contravenes this Court's precedent.

Finally, this Court has made it clear that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964). By deciding to resolve the question of class certification, instead of leaving that question to the arbitrator, the court below ignored this Court's long-standing injunction against judicial involvement in arbitration procedures.

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[9] See, *e.g.*, *Southland Corp.*, 465 U.S. at 4; *Government of United Kingdom*, 988 F.2d at 69; *Hyundai America*, 26 F. Supp. 2d at 1218; and cases cited in note 5 *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 19, 2000

APPENDIX A

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

DAVID E. SINTEK,	)	D031911
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	(Super. Ct. No. 717345)
	)	
PRUDENTIAL INSURANCE COMPANY OF AMERICA et al.,	)	
	)	
	)	(FILED MARCH 21, 2000)
Defendants and Appellants.	)	
	)	

APPEAL from an order of the Superior Court of San Diego County, Raymond F. Zvetina, Judge. Appeal treated as a petition for writ of mandate; petition denied.

Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. (collectively defendants) appeal an order granting their petition for arbitration of David E. Sintek's (Sintek) claims for fraud and breach of contract. Sintek agreed arbitration was appropriate, but requested the court order classwide arbitration. The trial court granted defendants' motion compelling Sintek to arbitrate, but stayed arbitration pending its determination whether class certification was appropriate. Defendants contend the court's order is appealable under Code of Civil Procedure section 1294 because the trial court effectively denied its motion to compel arbitration by staying arbitration until it determined the appropriateness of class certification.

Defendants argue because classwide arbitration is unavailable under the Federal Arbitration Act (FAA), the trial court erred in ordering a stay pending a determination on class certification. Treating this matter as a petition for writ of mandate, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

In his class action suit, Sintek alleges defendants contract with dentists such as Sintek to provide services to members of the Prudential Dental Maintenance Organization (DMO). Under a standard personal dentist agreement, DMO dentists are paid a fixed amount each month for each DMO member regardless of whether the DMO member is treated during any given month.

Sintek alleged defendants were required to pay DMO dentists for children under three, and that since joining defendants as a DMO dentist in 1989, Sintek had not received payments for services rendered to children under three. Sintek further alleged defendants failed to pay all DMO dentists who have provided services to children under three.

When defendants moved to compel arbitration and to stay further proceedings in Superior Court, Sintek acknowledged arbitration was appropriate,[1] but moved for an order conditioning arbitration on defendant's assent to classwide arbitration or, in the alternative, an order allowing a class action to proceed in superior court.

Considering the motions at the same time, the trial court stated it:

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[1] The arbitration agreement provided: "If any dispute or controversy shall arise among the parties hereto with respect to: the making, construction, terms, or interpretation of This Agreement; or the rights of any party hereto; or with respect to any transaction involved; the dispute or controversy shall be settled by arbitration. The arbitration shall be conducted by one (1) arbitrator, selected from the panel of arbitrators of the American Arbitration Association, in accordance with the commercial arbitration rules of the American Arbitration Association."

"believes itself bound by the holding of *Keating*, that class-wide arbitration is available in appropriate cases and *Lewis v. Prudential-Bache Securities Inc.* (1986) 179 Cal.App. 3d 935, approving in principle class arbitration of a dispute under an agreement subject to the FAA; provided that the trial court certifies the class.

"Whether this is an appropriate case for class arbitration should be determined at such time as the Court rules on a motion to certify the class . . . .

"The Court grants defendants' motion to compel arbitration but stays the arbitration until such time as the Court rules upon a motion to certify the class (and make the determination as to whether this is an appropriate case for class-wide arbitration.)"

DISCUSSION

1. *Appealability of Order*

Defendants contend the trial court's order granting the request for arbitration is directly appealable under Code of Civil Procedure section 1294, subdivision (a), because it is effectively a denial of individual arbitration as contemplated by the terms of defendants' arbitration agreements with Dr. Sintek.

"The existence of an appealable judgment is a jurisdictional prerequisite to an appeal. Thus, this court is obligated to review the question of appealability. [Citations.]" (*Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App. 4th 1064, 1070.) "It is the substance and effect of the adjudication, and not the form, which determines if the order is interlocutory and nonappealable, or final and appealable." (*Id.* at p. 1070.) If further judicial action is required for a final determination of the rights of the parties, the decree is interlocutory and not appealable unless it comes within the statutory classes of appealable interlocutory judgments. (*Ibid.*)

Contrary to defendants' assertions, the trial court's order cannot be construed as a denial of arbitration. Instead, the court granted defendants' motion but stayed actual arbitration until it

determined whether class certification was appropriate. Further judicial action (a determination on the appropriateness of class certification) is required by the court to determine whether the arbitration will proceed on an individual or classwide basis. Thus, the court's order is interlocutory and not appealable.

However, we elect to treat this matter as a petition for writ of mandate. Mandate is appropriate "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.[2]) If we deny review at this stage, the parties may face another appeal and further delay. Judicial economy will not be served by deferring resolution of the dispute in issue. (*Jacobs-Zorne v. Superior Court, supra,* 46 Cal.App. 4th at p. 1072; *Green v. GTE California, Inc.* (1994) 29 Cal.App. 4th 407, 410).

2. *Classwide Arbitration*

a. *Standard of Review*

Whether classwide arbitration is permissible involves the interpretation of the arbitration agreement, the applicability of the Federal Arbitration Act (FAA) (9 U.S.C.A. § 1 et seq.) and California law. The issue presented is one of law -- whether classwide arbitration is available. Accordingly, we review the question de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799.)

b. *Availability of Class Arbitration under California Law.*

The issue presented to us is whether a California court can, as authorized by state law, order classwide arbitration in a case that falls under the FAA when the arbitration agreement is silent on the issue. This question was recently presented to the Court of Appeal, Second District, Division Five in *Blue Cross of California v. Superior Court* (1998) 67 Cal.App. 4th 42 (*Blue Cross*). In a

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[2] All statutory references are to the Code of Civil Procedure unless otherwise specified.

well reasoned decision, that court determined California state law authorizing classwide arbitration in appropriate cases is not preempted by the FAA. We agree with that conclusion.

The underlying contract transactions involve commerce and therefore fall within FAA's purview. Section 2 of the FAA provides that the written arbitration clause in a contract "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C.A. § 2.) Section 4 of the FAA provides for a petition to compel arbitration in any "United States district court" and for the issuance of an order "directing the parties to proceed to arbitration in accordance with the terms of the agreement." (9 U.S.C.A. § 4.)

Defendants argue section 4 of the FAA and federal cases interpreting that section, bar classwide arbitration here; however, they cite no authority binding on us stating section 4 of the FAA controls state court action. The United States Supreme Court has expressly reserved the issue of whether section 4 of the FAA applies to state court. (*Southland Corp. v. Keating* (1984) 465 U.S. 1, 16, fn. 10; see also *Blue Cross v. Superior Court, supra,* 67 Cal.App. 4th at pp. 56, 63.) Defendants cite only lower federal appellate courts interpreting Section 4 and its application in federal court. We are not bound by these decisions. (*People v. Neer* (1986) 177 Cal.App.3d 991.)

Further, the California Supreme Court has concluded classwide arbitration is available in appropriate circumstances. (*Keating v. Superior Court, supra,* 31 Cal.3d 584, 611-612, app. dism. in part and judg. revd. in part on other grounds sub nom. *Southland Corp. v. Keating* (1984) 465 U.S. 1.) California appellate courts have followed *Keating*, as required by the doctrine of stare decisis, holding California courts are authorized to compel class arbitration. (*Blue Cross* v. *Superior Court, supra,* 67 Cal.App.4th at p. 52; *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1318-1322; *Lewis v. Prudential-Bache Securities, Inc.* (1986) 179 Cal.App.3d 935, 945-946.)

Given the United States Supreme Court has not ruled on the issue, we are bound to follow *Keating's* conclusion that California courts may, when appropriate, permit classwide arbitration to proceed.

We also note the trial court here has not yet certified the class nor made a final determination as to whether plaintiff's claims may proceed on a classwide basis. Thus, "[a]ny discussion on our part as to whether plaintiffs' claims should actually proceed on a classwide basis would be premature." (*Blue Cross v. Superior Court, supra*, 67 Cal.App.4th at pp. 55, fn.4.)

3. *Section 1281.3*

Defendants next argue the FAA preempts section 1281.3 because that section applies solely to arbitration.

The FAA was enacted to reverse long-standing judicial hostility to arbitration. (*Blue Cross v. Superior Court, supra,* 67 Cal.App.4th at p. 48.) It is predicated on Congress's authority to enact substantive rules under the commerce clause and creates a body of federal substantive law, applicable to both state and federal courts, requiring arbitration agreements to be honored. (*Id.* at p. 50.)

However, FAA federal preemption does not occupy the field (*Blue Cross v. Superior Court, supra,* 67 Cal.App.4th at p. 50.) "[It] contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. [Citation.]" (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477.) To the contrary, state law is only preempted to the extent it obstructs contractual arbitration. (*Blue Cross v. Superior Court, supra,* 67 Cal.App.4th at p. 50.) In other words, the FAA preempts state law only when state law requires "'a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" (*Volt Information Sciences, Inc. v. Leland Stanford Jr. Univ., supra,* 489 U.S. at p. 478, citing *Southland Corp. v. Keating, supra,* 465 U.S. at p. 10.)

Although section 1281.3 itself applies solely to arbitration, section 382[3] allows class actions in appropriate cases, including contract actions. Thus, although section 1281.3 is limited to arbitration, as other statutes allow class action, section 1281.3 does nothing that does not already apply to other contracts. Imposing California's class action procedure on arbitration does not conflict with the FAA because the procedure neither invalidates the arbitration clause nor restricts enforceability of the arbitration agreement in a manner not applicable to contracts generally. (See, *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 686-687; *Allied-Bruce Terminex Cos. v. Dobson* (1995) 513 U.S. 265, 270 ["the basic purpose of the Federal Arbitration Act is to overcome courts' refusals is to enforce agreements to arbitrate."]; *Rosenthall v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-410 [holding that California's procedure for summary determination of the petition to compel arbitration furthers, rather than defeats, the enforceability policy of the FAA].) Rather, California law encourages arbitration by permitting arbitration to proceed on a class basis where appropriate. The FAA does not preempt section 1281.3, particularly if the alternative is that each dentist would have to arbitrate identical issues with defendants.[4]

Defendants also claim that classwide arbitration cannot proceed because section 1281.3 removes an arbitrator's authority to decide how an arbitration should be conducted and therefore runs afoul of the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton Inc.* (1995) 514 U.S. 52. However, defendants have not shown the American Arbitration Association's (AAA) rules, which govern this arbitration, prevent

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[3] Section 382 provides: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

[4] By this statement we make no judgment as to the appropriateness of the class here.

their arbitrators from conducting classwide arbitration. To the contrary, defendants admit the "rules of the AAA may, or may not, provide arbitrators with the authority to direct class treatment of Dr. Sintek's claims." Thus, the defendants cannot establish the rules under which the arbitration is to be conducted prevent the arbitrators from conducting classwide arbitration. Hence, this argument is premature and we disregard it.

4. *The Arbitration Agreement Does Not Bar Classwide Arbitration*

Defendants also claim classwide arbitration is inappropriate because its arbitration agreement with Sintek does not specifically provide for classwide arbitration. Certainly, the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties. (*Mastrobuono v. Shearson Lehman Hutton Inc., supra,* 514 U.S. at p. 57.) Here, however, the parties' agreement is silent as to whether class arbitration was contemplated. As with all contracts, we construe ambiguous language against the interest of the drafter. (*Id.* at p. 62.) Defendants drafted the contract without referencing class arbitration. Had defendants intended to specifically exclude classwide arbitration, they easily could have done so. However, because defendants drafted an ambiguous document, "they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." (*Id.* at p. 63.)

In reviewing an analogous issue, the First Circuit in *New England Energy Inc. v. Keystone Shipping Co.* (1st Cir. 1988) 855 F.2d 1, 5, analyzed a state statute that allowed consolidated arbitration. The court stated:

> "We disagree that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four [of the FAA]. We believe . . . that an order not contradicting the contractual terms regarding arbitration is 'in accordance with [those] terms.' This is certainly true

> when the language of the arbitration clause is broad and in no way suggests limits on the subjects or parties to the agreed-upon arbitration. [Citations.] To borrow [an] illustration, a person directed to take an early plane to New York would be acting 'in accordance with' her instructions whether she flew coach or first class notwithstanding the instructions' silence on the type of seat to purchase. Our traveler also would not violate her instructions, which were silent on how she was to get to the airport, if she were to take a taxicab. Simply put, arbitration is still arbitration even if it is consolidated arbitration." (*New England Energy Inc. v. Keystone Shipping Co., supra,* 855 F.2d at p. 5.)

We agree with this analysis. The agreement we review is also silent regarding the parties' intent towards class arbitration. Further, arbitration is still arbitration even if consolidated or classwide. Thus, no expressed intent of these parties is compromised by permitting class arbitration to proceed should the trial court determine there is an appropriate class and class arbitration here.

5. *Section 1281.2*

Defendants also claim the trial court improperly stayed the arbitration under section 1281.2. Again, we find no error.

The standard of review for an order staying or denying arbitration is the well-known test for abuse of discretion. (*Pioneer Take Out Corp v. Bhavsar* (1989) 209 Cal.App.3d 1353, 1357.) Thus, the trial court's order will not be disturbed on appeal unless it exceeds the bounds of reason. (*Ibid.; Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Section 1281.2, subdivision (c) provides: ". . .[¶] If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party . . . the court . . . (4) may stay arbitration pending the outcome of the court action or special proceeding." Defendants

claim it is this section upon which the court based its stay pending determination on class certification.

The record, however, does not support this contention. The court's order does not indicate the court intended to stay the arbitration under section 1281.2. Accordingly, we do not address defendants' authority on this issue.

Further, the court did not stay arbitration pending conclusion of litigation. Although we have found no reported decision that defines the term litigation under section 1281.2, Black's Law Dictionary defines litigation as: "A lawsuit. [A] [l]egal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy." (Black's Law Dict. (5th ed. 1979) p. 841, col. 2.) Here, the trial court only stayed arbitration for a short period of time pending the determination as to the appropriateness of the class, a process which is expeditious or not depending on the degree of the parties' cooperation.

The court has the power to keep order in proceedings before it. (§ 177.) Ordering the stay in the limited circumstances here is an appropriate use of that power. Had the trial court not entered the stay, there would be no opportunity in this litigation for the court to determine whether class arbitration is appropriate. If the trial court denied the motion for arbitration, this matter would be before us in a different posture (a proper appeal) but nonetheless the issue would still be the appropriateness of class certification. We find no abuse of discretion in the trial court's granting the motion for arbitration and entering a limited stay for the sole purpose of determining class certification. The limited stay order was appropriate.

DISPOSITION

Having treated this appeal as a petition for writ of mandate, we deny the petition. Sintek shall have costs.

/s/ Work

WORK, J.

WE CONCUR:

/s/ Kremer
KREMER, P.J.

/s/ Huffman
HUFFMAN, J.

APPENDIX B

Fourth Appellate District, Division One, No. D031911

S088188

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

DAVID E. SINTEK, Respondent

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA Et Al., Appellants

Appellants' petition for review DENIED.

FILED JUNE 21, 2000

/s/ George
Chief Justice

APPENDIX C

Telephonic Motion 6/19/98

717345 Sintek v. Prudential Insurance

Defendants The Prudential Insurance Co. of America and The Prudential Health Care Plan of California, Inc.'s motions to compel arbitration pursuant to the contractual agreements between defendants and the individual plaintiff are granted. Plaintiff's cross-motion to condition the order compelling arbitration on defendants assent to classwide arbitration is denied.

The parties appear to agree that there is an arbitration agreement between them that covers this action and that such agreement is subject to the Federal Arbitration Act [hereinafter FAA]. Accordingly, the arguments focused on the issue of classwide arbitration and the applicable law regarding that issue.

As a general rule, California law should be applied in this type of situation. Case law provides that "although the courts of California are bound by the decisions of the United States Supreme Court, they are not bound by the decisions of lower federal courts, even on federal questions." *People v. Superior Court (Napa County)* 50 Cal.App.4th 1202. See also Witkin California Procedure *Appeal* § 917 et seq. Here, California law provides that classwide arbitration is not prohibited under the Federal Arbitration Act; classwide arbitration is permitted if the case is appropriate for class treatment, *Keating v. Superior Court* 31 Cal.3d 584; *Lewis v. Prudential-Bache Securities, Inc.* 179 Cal.App.3d 935. This law developed after the United States Supreme Court in *Southland Corp. v. Keating* (1984) 465 U.S. 1, remanded the *Keating v. Superior Court* case to the state courts *without deciding whether the Federal Arbitration Act precluded class actions*. The Supreme Court held that "as to the question whether the Federal Arbitration Act precludes a class action arbitration and any other issues not raised in the California courts, no decision by this court would be appropriate at this time."

Southland at 16. The inaction of the Supreme Court resulted in the California courts allowing classwide arbitration, even if not specifically provided or by agreement, in "appropriate" cases based upon the reasoning of the California Supreme Court in the original *Keating v. Superior Court* case. In *Keating v. Superior Court*, the California Supreme Court noted that there was no authority regarding classwide arbitration proceedings under the FAA. It appears that the Court, in the absence of direct federal authority on classwide arbitration, sought to find analogous authority in federal precedent regarding consolidated arbitration proceedings. (Specifically, the court cited *Matter of Czarnikow-Rionda Co., Inc.* (S.D.N.Y. 1981) 512 F.Supp. 1308, 1309; *Compania Espanola de Pet., S.A. v. Nereus Ship.* (2d Cir. 1975) 527 F.2d 966, 975, cert. den. (1976) 426 U.S. 936; *Marine Trading Ltd. v. Ore Intern. Corp.* (S.D.N.Y. 1977) 432 F.Supp. 683; and *Robinson v. Warner* (D.C.R.I. 1974) 370 F.Supp. 828). In doing so, it appears that the Court was not staking out a distinct California rule, but rather seeking to anticipate an as yet unarticulated federal interpretation of a federal statute.

Since the *Keating v. Superior Court* decision was issued, the federal authority regarding the use of classwide arbitration under the FAA has changed significantly. The cases relied upon by the Court have been repeatedly questioned and distinguished, and the second, fifth, sixth, eighth, ninth and eleventh circuits have all held that absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements "in accordance with the terms thereof" as set forth in section 4 of the FAA bars district courts from applying rule 42(a) to require consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims. Moreover, in *Champ v. Siegel Trading Co.* (1995) 55 F.3d 269, the seventh circuit held that § 4 of the FAA, requiring that district courts enforce arbitration agreements in accordance with their terms, precludes federal judges from ordering class arbitration when the parties' arbitration agreement is silent on the matter. Thus, there has been a significant change in the state of the law from that upon which the California Supreme Court based its ruling in *Keating v.*

Superior Court. Given the Court's obvious deference to federal authority regarding consolidated arbitration in the *Keating v. Superior Court* decision, this Court is of the view that the California Supreme Court, in formulating its holding in *Keating* did not intend to cast its decision in concrete. Accordingly, rather than follow the literal holding of *Keating* in mechanical fashion as if time had stood still since 1982, this Court believes the spirit and rationale of *Keating* contemplates California's deference to the virtually uniform federal appellate authority which has since elucidated the FAA as barring classwide arbitration.

Should this approach by a lower court be regarded as presumptuous, the Court notes that it would reach the same result under California law as it appears to stand under the *Keating* and *Lewis* cases. Unlike the situation in *Keating, Lewis* and *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, here the individual compensatory damage claims are large enough to warrant the time and expense of individual arbitration. In the almost identical federal action, plaintiff asserted that his damages exceeded $75,000 and he does not argue that his damages are any less in this action or that they are more substantial than those of other class members. This is certainly an amount large enough to warrant either individual litigation or individual arbitration and defeats one of the fundamental reasons class actions are preferred. Additionally, it appears that there is not complete uniformity among the contracts between the proposed class member dentists and Defendants. Uniformity, when present, is another reason class actions are a preferred method for litigation. Moreover, because of the difference in payment arrangements between the contracting parties, the circumstances under which contracts were negotiated and executed, and applicable state laws, the typicality and commonality required for class certification and important to the determination of whether classwide arbitration is appropriate are not present. This is especially true since it appears that the claims depend upon representations made to the individual dentists outside the written agreements, and they must necessarily be varied and ad hoc to individual circumstances.

This minute order constitutes the formal order of the Court; No further order is required.

/s/ Raymond F. Zvetina
HON. RAYMOND F. ZVETINA

APPENDIX D

Aug. 11, 1998

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

SINTEK, D.D.S.,	)	Case No. 717345
	)	RULING ON
Plaintiff,	)	SUBMITTED
	)	MATTERS
v.	)	
	)	
THE PRUDENTIAL INSURANCE COMPANY, et al.,	)	
Defendants.	)	
	)	

In its tentative ruling of June 19, 1998, this Court opined that if the California Supreme Court were to revisit *Keating v. Superior Court* (*Southland Corp.*) 31 Cal.3d 584 (1982), it would come out differently in light of the wealth of subsequent federal authority precluding class-wide or consolidated arbitration under the Federal Arbitration Act where the parties had not expressly so provided. While it does appear that the great majority of Federal Circuit Courts of Appeal now subscribe to the view expressed in *Champ v. Siegel Trading Co., Inc.* 55 F.3d 269, 277 (7th Cir. 1995), that under the FAA "we are obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis", these rulings were made under section 4 of the FAA, which by its terms applies only to United States District Courts. While these cases are interpretations of the meaning of an arbitration agreement subject to the Act, they do not purport to be interpretations of any section of the FAA applicable to the state courts, or to be part of a "federal

substantive law of arbitrability" under section 2 of the Act. Thus, this Court is not confident *Keating* revisited would produce a different result.

Accordingly, the Court believes itself bound by the holding of *Keating*, that class-wide arbitration is available in appropriate cases and *Lewis v. Prudential-Bache Securities, Inc.* (1986) 179 Cal.App.3d 935, approving in principle class arbitration of a dispute under an agreement subject to the FAA; provided that the trial court certifies the class.

Whether this is an appropriate case for class arbitration should be determined at such time as the Court rules on a motion to certify the class. The Court's tentative conclusion that it was not such a case was premature.

The Court grants defendants' motion to compel arbitration but stays the arbitration until such time as the Court rules upon a motion to certify the class (and make the determination as to whether this is an appropriate case for class-wide arbitration.) The Court sets an ex parte hearing on September 1, 1998 at 8:30 AM to discuss a schedule for discovery and the motion to certify the class.

IT IS SO ORDERED.

Dated: Aug. 11, 1998

/s/ Raymond F. Zvetina
RAYMOND F. ZVETINA
Judge of the Superior Court

APPENDIX E

[From: Personal Dentist Agreement]

ARTICLE V - ARBITRATION

If any dispute or controversy shall arise among the parties hereto with respect to: the making, construction, terms, or interpretation of This Agreement; or the rights of any party hereto; or with respect to any transaction involved; the dispute or controversy shall be settled by arbitration. The arbitration shall be conducted by one (1) arbitrator, selected from the panel of arbitrators of the American Arbitration Association, in accordance with the commercial arbitration rules of the American Arbitration Association. Any costs associated with such arbitration proceedings shall be born equally by the parties.

APPENDIX F

[9 U.S.C.]

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the

parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

APPENDIX G

Cal. Civ. Proc. Code § 1281.3 (2000)

§ 1281.3. Petition to consolidate separate arbitration proceedings

A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and

(2) The disputes arise from the same transactions or series of related transactions; and

(3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator in accord with the procedures set forth in Section 1281.6.

In the event that the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances.

The court may exercise its discretion under this section to deny consolidation of separate arbitration proceedings or to consolidate

separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.

This section shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

Supreme Court, U.S.
FILED
NOV 17 2000
CLERK

(2)

No. 00-429

In The

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and PRUDENTIAL HEALTH CARE PLAN OF CALIFORNIA, INC.,

Petitioners,

v.

DAVID E. SINTEK, D.D.S.,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. § 1257(a), the Supreme Court lacks jurisdiction to grant a writ of certiorari to review an unpublished opinion of a California intermediate appellate court following discretionary review of an interlocutory order of the trial court.

2. Whether a California state court can order a party to an arbitration agreement that is subject to the Federal Arbitration Act to engage in discovery and a motion that might result in consolidated classwide arbitration where the agreement does not forbid such a process and the agreement affirmatively provides it is to be construed and governed by the laws of the State of California.

PARTIES TO THE PROCEEDING

Petitioners are The Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. Respondent is David E. Sintek.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, because respondent David E. Sintek is an individual.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiff/respondent David E. Sintek ("Sintek") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by defendants/petitioners Prudential Insurance Company of America and Prudential Health Care Plan of California, Inc. (collectively "Petitioners" or "Prudential"), in which they are seeking review of the California Court of Appeal's decision in *Sintek v. Prudential Ins. Co. of America*, No. D031911 (Cal. Ct. App. Mar. 21, 2000) (nonpub. op.) (the "Opinion").

NO JURISDICTIONAL AUTHORITY

This Court has no jurisdictional authority to grant Prudential's Petition under 28 U.S.C. § 1257(a). The Opinion for which review is sought in this case is from discretionary review (denying relief) of an interlocutory order of the trial court. Accordingly, there is no final judgment. Under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), therefore, this Court lacks jurisdiction to review the Opinion by writ of certiorari. This lack of jurisdiction is briefed in further detail below at part I, entitled, "There Is No Jurisdiction."

TEXT OF OTHER STATUTES INVOLVED

In addition to the statutory provisions set forth in the Petition, the jurisdictional statute, 28 U.S.C. § 1257(a),

and California Rules of Court, rule 977(a) and (b), are also pertinent. They provide:

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Rules of Court, Rule 977

Citation of Opinions

(a) [Unpublished opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same

> defendant or respondent in another such action or proceeding. [Emphasis in original.]

The federal statute is discussed below at part I, entitled, "There Is No Jurisdiction." The state rule is discussed below at part II, entitled, "The Opinion Sets No Precedent and Affects Only Sintek and Prudential."

STATEMENT OF THE CASE

The "Factual and Procedural Background," as set forth in the Opinion, is hereby incorporated by reference. *See* Pet., App. at 17a-18a.

Further, Prudential inaccurately set forth the procedural history from the proceedings in the trial court. Specifically, Prudential stated that the trial court "reversed itself" when it granted Prudential's motion to compel arbitration but stayed the arbitration until such time that it could rule on a motion to certify a class. Pet. at 3-4. The trial court did not "reverse itself." Rather, on June 19, 1998, the court issued a telephonic ruling that was subject to oral argument. *See* Pet., App. at 13a-16a. After oral argument, the trial court took the matter under submission and issued a formal written ruling on August 11, 1998. *Id.*, at 17a-18a (June 19 telephonic a "tentative ruling").

Finally, Prudential omitted an important provision of the parties' arbitration agreement. Article III.H, of the parties' agreement states as follows: "All rights and

remedies hereunder will be cumulative and not alternative, and **this Agreement shall be construed and governed by the laws of the State of California[.]**" (Emphasis added.)

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because this Court does not have jurisdiction. The Opinion for which review is sought is a decision of a California intermediate appellate court following discretionary review (denying relief) of an interlocutory order from the trial court. The Opinion is not a "final judgment," as that term is used in 28 U.S.C. § 1257(a); nor does this case present one of the exceptional situations where jurisdiction may nonetheless be conferred. Indeed, significant issues must first be determined before review by this Court would be proper or fruitful. More specifically, neither the state trial court nor state appellate courts have been presented with the issue, let alone decided, **whether** arbitration proceedings will be consolidated. If consolidation or class certification is denied, for instance, Prudential's Petition would be moot.

Additionally, the Petition should be denied because the Opinion by the California intermediate appellate court was unpublished. Accordingly, the Opinion has no precedential value, affecting only Sintek and Prudential.

As for the merits, the Petition should be denied because the Opinion addresses only state procedural rules that do not conflict with the Federal Arbitration Act ("FAA" or the "Act"); nor does the Opinion conflict with

the federal authorities relied upon by Prudential. The Opinion is in harmony with the view taken by the First Circuit (applying state procedural law) and is readily distinguishable from decisions from the seven circuits (applying federal procedural law) and the state courts (also applying federal procedural law) that Prudential claims are in purported conflict.

Finally, because the Opinion enforces the arbitration agreement under the law governing the arbitration provision agreed to by the parties (i.e., California law), the Opinion properly construes the FAA, promotes the legislative intent behind the Act, and does not encourage forum shopping.

I. There Is No Jurisdiction

This Court lacks jurisdiction to grant Prudential's Petition. This Court's review of state court decisions is limited to "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). In an attempt to invoke jurisdiction under 28 U.S.C. § 1257(a), Prudential claims that the Opinion is a "final decision" rejecting a "federal law challenge" and a "final judgment" staying the arbitration proceedings. *See* Pet. at 1. Prudential's characterization of the Opinion is wrong.

The language contained in 28 U.S.C. § 1257(a) "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120,

124 (1945). In fact, to be reviewable by this Court, a state court decision "must . . . be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). The state court decision "must be the final word of a final court." *Ibid.*

Here, however, the California intermediate appellate court's Opinion for which review is sought in this case is not a "determination of the litigation." To the contrary, as conclusively stated by the court in its Opinion, "the [trial] court's order is interlocutory and not appealable." Pet., App. 4a. After all, in the Opinion the appellate court merely affirmed the trial court's order that concluded by setting a hearing "to discuss a schedule for discovery and a motion to certify the class." *Id.*, at 18a. Indeed, the state trial court may ultimately determine that Sintek's claims should not proceed on a classwide basis. *See* Pet., App. at 6a. Moreover, in the event a class is certified, Prudential will be able to appeal such a ruling in California appellate courts (and this Court) after entry of a **final judgment** confirming any arbitration award. At that time, Prudential will be able to seek judicial review of any rulings related to whatever class or consolidation procedures are utilized. Even if the California appellate courts adhere to their prior determinations that classwide arbitrations are permissible, such a ruling in this case following final judgment should in no way limit this Court's ability to review the issue on final judgment. *Jefferson*, 522 U.S. at 83. For these reasons, the Opinion here is unquestionably interlocutory.

Finally, Sintek is aware of the exceptions to the finality requirement set forth by the Court in *Cox Broad. Corp.*

v. Cohn, 420 U.S. 469 (1975). However, the California intermediate appellate court's Opinion does not come within any of the limited situations in which the Court may treat a state court judgment as final, even though further proceedings are to take place.

As explained in *Cox*, the finality requirement is satisfied only where, despite further state court proceedings, (1) "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings," (3) "the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," (4) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox*, 420 U.S. at 479-83.

None of these exceptional situations is present here: (1) the purported "federal issue" is not conclusive, because Prudential may defeat class certification; no outcome is "preordained"; (2) the purported "federal issue" may not require a decision following the outcome in the state court proceedings, either because the class may not

be certified or arbitration proceedings may not be consolidated or because Prudential may prevail at the arbitration; (3) the purported "federal issue" can be reviewed following entry of a final judgment confirming any arbitration award; and (4) the reversal of the Opinion based on the purported "federal issue" would not preclude further litigation on the claims, because Prudential will be required to defend Sintek's claims regardless whether a class is certified or arbitration proceedings are consolidated.

In sum, because there is no final judgment, and because this case does not fall within any recognized exceptions to the rule limiting jurisdiction to review of final judgments, the Court lacks jurisdiction to grant the requested writ of certiorari. Because the California courts must be afforded the opportunity to reach a final judgment before review by this Court, the Petition should be denied.

II. The Opinion Sets No Precedent and Affects Only Sintek and Prudential

Sintek notes that, in determining which matters to review, this Court is interested in opinions that have a more far-reaching effect than those that affect only the litigants. Here, the Opinion has no precedential value and affects only Sintek and Prudential.

The California Court of Appeal's Opinion was not published. Subject to limited exceptions (none of which is

even arguably applicable here[1]), unpublished opinions of a Court of Appeal cannot be cited or relied on by a court or a party in any other action or proceeding. Cal. Rules of Court, rule 977(a); *Davis v. Superior Court*, 27 Cal. App. 4th 623, 628, 33 Cal. Rptr. 2d 6, 9, n.2 (Cal. Ct. App. 1994); *Barber v. Superior Court*, 234 Cal. App. 3d 1076, 1082, 285 Cal. Rptr. 668, 671 (Cal. Ct. App. 1991); *see also Hankins v. El Torito Restaurants, Inc.*, 63 Cal. App. 4th 510, 518, 74 Cal. Rptr. 2d 684, 689, n.2 (Cal. Ct. App. 1998).

Because unpublished opinions cannot be cited, such opinions necessarily have no precedential effect. *See Nelson v. Justice Court*, 86 Cal. App. 3d 64, 66, 150 Cal.

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[1] In California, an unpublished opinion can be cited or relied on only in the following limited circumstances:

- when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel. Cal. Rules of Court, rule 977(b)(1); *see, e.g., Hummel v. First Nat'l Bank*, 191 Cal. App. 3d 489, 49, 236 Cal. Rptr. 449, 450, n.1 (Cal. Ct. App. 1987) (law of the case); *Runyan v. Ellis*, 40 Cal. App. 4th 961, 965, 47 Cal. Rptr. 2d 356, 360 (Cal. Ct. App. 1995) (collateral estoppel).
- when the opinion is relevant to a criminal or disciplinary action or proceeding against the same defendant or respondent. Cal. Rules of Court, rule 977(b)(2).
- when a workers' compensation appeals board case is reported in the "California Compensation Cases" or the "California Workers' Compensation Reporter" and the case is cited to a workers' compensation appeals board. *See Martin v. Workers' Compensation Appeals Bd.*, 59 Cal. App. 4th 333, 345, 69 Cal. Rptr. 2d 138, 146, n.2 (Cal. Ct. App. 1997) (Workers' Compensation Appeals Board panel decisions "are persuasive authority").

Rptr. 49, 50 (Cal. Ct. App. 1978). In fact, citation of an unpublished opinion may cause a California court to return or strike a brief and may lead to monetary sanctions. Cal. Rules of Court, rule 26(a)(2); *see Alicia T. v. County of Los Angeles*, 222 Cal. App. 3d 869, 885-86, 271 Cal. Rptr. 513, 520-21 (Cal. Ct. App. 1990) ($750 sanction assessed against appellant's counsel whose opening and reply brief repeatedly cited unpublished case).

Thus, the Opinion in this case is limited to this case. It will have no impact, precedential or otherwise, on anyone other than Sintek and Prudential. As such, this Court should deny the Petition.

III. The California Intermediate Appellate Court's Opinion Is Not Inconsistent with the Decisions Relied on by Petitioners

Prudential argues that the California intermediate appellate court's Opinion runs afoul of the "very purpose" of the Act, i.e., ensuring that "private agreements to arbitrate are enforced according to their terms." *See* Pet. at 5-11. Prudential contends that the Opinion, and a similarly decided decision from the First Circuit, conflict with the decisions of seven other federal circuits and several states. Prudential is wrong. The instant Opinion is not inconsistent with the decisions relied on by Prudential.

Specifically, as established below, none of the decisions relied on by Prudential invalidated **state** procedures allowing classwide or consolidated arbitration based on the FAA's **substantive** provisions (e.g., 9 U.S.C. § 2). In

this regard, the various federal circuit court and state court decisions relied on by Petitioners are those in which FAA arbitrations were ordered **under § 4 of the FAA**. *See* Pet. at 5-10. However, § 4 merely contains "implementing provisions of the Act" which "expressly apply only to federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 29 (1984) (O'Connor, J, dissenting). Thus, because California has procedural provisions that allow for consolidated or classwide arbitrations, and the parties chose California law to govern their agreement, the Opinion is in harmony with the cases cited by Prudential.

A. There Is No Division Between the Federal and State Courts over the Issue Presented Here

In order to encourage review by this Court, Prudential has manufactured a conflict between the circuits, by grouping federal decisions into two camps: (1) those circuits that purportedly support the "principal purpose of ensuring that private arbitration agreements are enforced according to their terms" and deny class arbitrations; and (2) the circuit that allowed a class arbitration under state law, thereby purportedly thwarting the FAA's "principal purpose." *See* Pet. at 5-13.

More specifically, Prudential contends that review of the Opinion should be granted, because it follows *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) and conflicts with seven other federal circuits. *See* Pet. at 6-11. Prudential claims that the *New England Energy* decision and the instant Opinion conflict with the following federal decisions: *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th

Cir. 1995); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); and *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989). *See* Pet. at 6-8.

Although the federal circuit courts have reached different conclusions with regard to the permissibility of classwide or consolidated arbitrations, these varied results do not signify conflict. The two groups of decisions are not inconsistent based on their underlying procedural facts. There is no conflict between (1) the Opinion or the *New England Energy* decision, on the one hand, and (2) the seven circuit court decisions identified by Prudential, on the other hand, because in *New England Energy* (like the Opinion here), the court applied state procedural law. *New England Energy*, 855 F.2d at 3 (applying a Massachusetts arbitration consolidation statute).

In the present case, the parties agreed that the arbitration proceeding "shall be construed and governed by the laws of the State of California" which, of course, includes **state procedural law**. (This provision is discussed in greater detail in the text below at part III.B.) For this reason, the Opinion is analogous to the *New England Energy* case, in which the court concluded that, where the state procedural statute authorizes consolidation of arbitration proceedings absent the parties' agreement to the contrary, the state procedure was not invalidated by the FAA. *New England Energy*, 855 F.2d at 3.

In contrast, in each of the decisions from the seven circuits cited by Petitioners, the court based its decision on federal procedural law, specifically § 4 of the FAA, 9 U.S.C. § 4. *Champ*, 55 F.3d at 277 (holding that under § 4 a district court cannot order consolidation absent express agreement of the parties); *American Centennial*, 951 F.2d at 108 (affirming the district court's order compelling a single arbitration under § 4); *United Kingdom*, 998 F.2d at 71 (holding that § 4 does not authorize consolidation of arbitration proceedings by a district court); *Del E. Webb Constr.*, 823 F.2d at 150 (§ 4 limits the authority of district courts to consolidate arbitrations absent express agreement by the parties); *Baesler v. Continental Grain Co.*, 900 F.2d at 1194-95 (affirming the district court's denial, based on § 4, of a motion for summary judgment seeking consolidation of several arbitration claims); *Weyerhaeuser*, 743 F.2d at 637 (affirming the district court's denial of consolidated arbitration under § 4); and *Protective Life*, 873 F.2d at 282 (§ 4 limits a district court from consolidating arbitrations absent express agreement by the parties).

Significantly, three of these federal appellate decisions specifically distinguished their procedural facts (i.e., applying federal procedural law) from those in the First Circuit's *New England Energy* decision (i.e., applying state procedural law). In particular, the Seventh Circuit stated that it was not required to determine whether to follow *New England Energy* because, in the Seventh Circuit's case, the parties did not argue that state arbitration law authorized class arbitration. *Champ*, 55 F.3d at 275, n.2. Similarly, in *United Kingdom*, the Second Circuit expressly noted that its decision differed from *New England Energy*, because in *New England Energy* the First

Circuit "relied on a state arbitration law that specifically authorizes such consolidation." *United Kingdom*, 998 F.2d at 73, n.2. Likewise, in *Baesler*, the Eighth Circuit stated that, because the appellant did not contend that state law contained a procedural provision authorizing consolidated arbitrations, the court did not have to decide whether to follow *New England Energy*. *Baesler*, 900 F.2d at 1195. Thus, contrary to Prudential's suggestion, there is no conflict in the federal appellate court decisions.

The various state authorities relied on by Prudential also are distinguishable. *See* Pet. at 8-10.

Both of the New York cases cited by Prudential fully support Sintek's position. In *Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 647 N.E.2d 1298 (N.Y. 1995), the court concluded that, because the parties did not explicitly agree state law would govern their arbitration, the agreement fell under the procedural provisions of the FAA. *Id.*, at 1301. In *Cullman Ventures, Inc. v. Conk*, 682 N.Y.S.2d 391 (Sup. Ct. App. Div. 1998), the intermediate appellate court reversed the trial court's order consolidating in New York arbitration proceedings in New York and Indiana (and enjoining the parties from arbitrating in Indiana). In so doing, the appellate court based its decision principally on the fact that New York procedure does not provide for consolidation of arbitration proceedings, citing as authority the Second Circuit's decision in *United Kingdom*, 998 F.2d 68 (holding that consolidation of arbitration proceedings is not authorized under § 4 of the FAA). *Cullman*, 682 N.Y.S.2d at 228-29.

The Alabama and Delaware cases relied upon by Petitioners also are distinguishable from the instant matter. In *Med Ctr. Cars, Inc. v. Smith*, 727 So.2d 9 (Ala. 1998), each of the arbitration clauses at issue specifically invoked FAA procedural rules. *Id.*, at 14, 15 and 16. Therefore, the issue of state procedural rules did not arise. The Delaware Chancery Court's decision in *Steinberg v. Prudential-Bache Securities, Inc.*, No. 8173, 1986 Del. Ch. LEXIS 17 (Del. Ch. Apr. 9, 1986), addressed an attempt by the plaintiff to prevent arbitration altogether and allow class litigation in court. There, the court rejected the plaintiff's suggestion that if arbitration be ordered it should be classwide, because there was no authority for such a procedure under either New York or Delaware law (unlike California which has both statutory and case law authority). *Id.*, at *15.

Thus, the various federal and state decisions cited by Prudential do not conflict with the Opinion here.

B. California Procedural Law Applies to the Parties' Agreement

The parties agreed to apply the law of California. At Article III.H of the parties' contract, Sintek and Prudential agreed as follows:

> All rights and remedies hereunder will be cumulative and not alternative, and **this Agreement shall be construed and governed by the laws of the State of California**[.]

Under California case law, classwide arbitration is permissible. *Keating v. Superior Court*, 31 Cal. 3d 584, 608-14, 645 P.2d 1192, 1206-10, 183 Cal. Rptr. 360 (1982),

app. dism. in part, revd. in part on other grounds sub nom. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42, 52-56, 65, 78 Cal. Rptr. 2d 779, 785-88, 794 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1318-22, 231 Cal. Rptr. 315, 319 (Cal. Ct. App. 1986); *Lewis v. Prudential-Bache Securities, Inc.*, 179 Cal. App. 3d 935, 945-46, 225 Cal. Rptr. 69, 75 (Cal. Ct. App. 1986).

Additionally, under California statutory law, Cal. Civ. Proc. Code § 1281.3 allows for the consolidation of arbitration proceedings upon a sufficient showing, *inter alia*, that the disputes arise from the same transaction or series of related transactions and that there is a common issue of law or fact. *See Keating*, 31 Cal.3d at 612 & n.19, 645 P.2d at 1208 & n.19.

Thus, because California law provides for consolidated or classwide arbitration and the parties in their agreement chose California law, this case is analogous to the *New England* decision and is readily distinguishable from those federal and state cases that Prudential claims are in conflict. For these reasons, the Petition should be denied.

The propriety of the application of California's procedural arbitration rules to the parties' agreement is discussed immediately below at part IV.

IV. The Opinion Properly Construes the FAA and Promotes its Principal Purpose of Enforcing Agreements According to Their Terms

Prudential relies on *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); and *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478-79 (1989), for the proposition that the purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. *See* Pet. at 5. Based on these decisions, Prudential specifically argues that the "court below erred in failing to find that the California consolidation statute is preempted in this case by the FAA's basic command to enforce arbitration agreements 'according to their terms.' " *See* Pet. at 17. Prudential does not cite to any express language in the FAA that supports preemption; rather, it relies solely on an argument that the Opinion frustrates FAA's principal purpose. Prudential is wrong.

The Opinion is completely consistent with the FAA. In fact, where (as here) state arbitration rules are to be applied, this Court's decision in *Volt*, 489 U.S. 468, is particularly supportive of Sintek's position. Although *dictum*, the following passage in the *Volt* decision provides significant guidance to the issue currently presented by Prudential:

> **[W]e think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration.** As indicated, the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty disputes when some or all of the

> contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, **by giving courts authority to consolidate . . . arbitration proceedings in these situations.**

Id., at 498, n.5 (emphasis added). Equally instructive are the Court's closing remarks:

> In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which "require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration." But **it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.** Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. . . . **Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.** . . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Id., at 478-79 (citations omitted; emphasis added).

Very simply, the scope of federal preemption under the FAA is not all-encompassing: "The FAA contains no

express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.*, at 477. Rather, state law is preempted under the FAA only "to the extent that it actually conflicts with federal law – that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ibid.* (citation omitted).

In this regard, the Congressional intent behind section 2 of the FAA, 9 U.S.C. § 2 – a **substantive** provision of the FAA regarding validity and enforceability of arbitration provisions and fully **applicable** in state court – was to declare a national policy favoring arbitration, to overrule the judiciary's reluctance to enforce arbitration agreements, and to treat arbitration agreements the same as all other contracts generally. *See Southland Corp.*, 465 U.S. at 10; *Volt*, 489 U.S. at 478. In contrast, however, there is "no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476.

In *Volt*, the issue before the Court was whether Cal. Civ. Proc. Code § 1281.2(c) – which allows for the stay of an arbitration pending the resolution of related litigation under specified circumstances – was preempted by the FAA. *Id.*, at 477-78. The Court concluded that, because § 1281.2(c) was a state **procedural rule** governing the conduct of the arbitration **and did not disfavor arbitration**, the FAA did not preempt enforcement of the statute. *Id.*, at 478-479. In *Volt*, the Court "h[e]ld that application of the California statute [allowing the trial court to stay arbitration pending resolution of related litigation] is not pre-empted by the [FAA], 9 U.S.C. § 1 et seq., in a case

where the parties have agreed that their arbitration agreement will be governed by the law of California." *Volt*, 489 U.S. at 470.

Like Cal. Civ. Proc. Code § 1281.2(c) at issue in *Volt*, § 1281.3 at issue here applies only to the conduct of the arbitration and actually promotes and favors arbitration by the consolidation process. As the Court of Appeal aptly stated, § 1281.3 "does not conflict with the FAA, because the **procedure** neither invalidates the arbitration clause nor restricts enforceability of the arbitration agreement in a manner not applicable to contracts generally." Pet., App. at 7a (emphasis added). Thus, since Cal. Civ. Proc. Code § 1281.3 does not "undermine the goals and policies of the FAA" (*Volt*, 489 U.S. at 478), the FAA does not preempt application of § 1281.3.

> Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration – rules which are manifestly designed to encourage resort to the arbitral process – simply does not offend the rule of liberal construction [favoring arbitration], nor does it offend any other policy embodied in the FAA.

Id., at 476.

Based on the foregoing, Petitioners' arguments regarding preemption under the FAA are misplaced. Very simply, the Opinion properly construed the arbitration provision at issue under the FAA and this Court's decisions interpreting the Act. Accordingly, the Petition should be denied.

V. The Public Policy Arguments Advanced by Petitioners Are Not Compelling

Prudential argues that the Opinion represents a "nationwide conflict" that requires "prompt resolution" to prevent "forum-shopping" and "judicial interference in arbitrable disputes." *See* Pet. at 13-16. Petitioners' argument in this regard is neither accurate nor compelling.

Preliminarily, as discussed in detail in the text above at part III, there is no conflict between (1) the Opinion or the *New England* decision, on the one hand, and (2) any of the federal or state decisions relied on by Petitioners, on the other hand. The First Circuit is the **only circuit** that has addressed an issue analogous to that presented here. The Opinion follows the First Circuit's *New England* decision. Thus, there is no immediate need to address the issue presented in this case – namely, whether a state court can order a party to an arbitration agreement that is subject to the FAA to engage in discovery and a motion that might result in classwide arbitration where the agreement does not forbid such a process and the agreement affirmatively provides it is to be construed and governed by the state's laws that allow such procedures.

Indeed, Petitioners' arbitration statistics belie their claim that prompt resolution is needed. That, by Petitioners' figures, 140,188 cases were filed with the American Arbitration Association last year alone and still Petitioners are unable to cite any case invalidating a state consolidation procedure is telling. Contrary to Petitioners' rhetoric, this is not as significant an issue as they would like the Court to believe.

Equally insignificant is Petitioners' concern over forum-shopping. California procedure allowing for consolidation of classwide arbitration (Cal. Civ. Proc. Code § 1281.3) was enacted in 1978; and California's highest appellate court specifically approved of classwide arbitration under this statute in 1982 (*Keating*, 31 Cal.3d at 608-14, 645 P.2d at 1206-10). Petitioners, who drafted the agreement, were responsible for the language implementing California procedural law; and the parties did not sign it until 1989, many years after the state's highest court authorized consolidation of classwide arbitration. Thus, Petitioners cannot now complain if a party to the agreement they drafted selects a forum available to him based on language Petitioners used in their form agreement.

Finally, Petitioners overplay the role that might be required of the judiciary in overseeing arbitrations. Petitioners assume that every case on which class discovery is ordered ultimately will be certified. Presumably, many cases would be weeded out on the front end following a determination that they are not suitable for classwide arbitration. As for judicial review on the back end, if anything, the judiciary's workload will be reduced by classwide arbitration. Instead of requiring a potentially unlimited number of courts to confirm (or vacate) a potentially unlimited number of individual arbitration awards, following consolidated arbitration only one court will be required to confirm (or vacate) only one global award. Thus, Petitioners' concern about the effect on the judiciary's workload is misplaced.

Petitioners have not offered any compelling policy reasons for the immediate review of the Opinion here. Accordingly, the Petition should be denied.

CONCLUSION

This Court has no jurisdiction to grant Prudential's Petition under 28 U.S.C. § 1257(a). The Opinion for which review is sought in this case affirms an interlocutory procedural order of the state trial court. Accordingly, the Petition should be denied, because there is no final judgment for this Court to review. *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

Further, even if this Court had jurisdiction, review is not warranted because Petitioners have not demonstrated any conflict between reported decisions so as to justify the use of this Court's time and resources. The Opinion is in harmony with the FAA and the authorities interpreting it. The Opinion also is in tune with the "principal purpose of ensuring that private arbitration agreements are enforced according to their terms." After all, "arbitration is still arbitration even if it is consolidated arbitration." *New England*, 855 F.2d at 5. "There is no federal policy favoring arbitration under a certain set of procedural rules." *Volt*, 489 U.S. at 476.

Moreover, because the state intermediate appellate court's Opinion is not published, it has no precedential value and affects only the private litigants involved.

Finally, use of California's procedure to consolidate arbitration proceedings does not conflict with the FAA,

because the procedure neither invalidates the arbitration provision nor restricts enforceability of the arbitration agreement in a manner inapplicable to other contracts generally. To the contrary, this procedure – approved by statute since at least 1978 and by the state's highest court since at least 1982 – encourages arbitration according to the terms of the parties' agreement.

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 00-429

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND PRUDENTIAL HEALTH CARE PLAN OF CALIFORNIA, INC.,

Petitioners,

v.

DAVID E. SINTEK, D.D.S.,

Respondent.

On Petition For A Writ of Certiorari To the California Court of Appeal, Fourth Appellate District

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION[1]

The petition showed that this case squarely presents an important question over which both the state and federal courts are sharply divided: whether the FAA's core purpose of enforcing arbitration agreements according to their terms prohibits courts from ordering classwide arbitration that is not authorized by the parties' arbitration agreement.

Respondent's brief challenges this Court's jurisdiction and then argues that review is not warranted because the decision below is unpublished, the conflict can be explained away, or the conflict need not be resolved. As we show herein, those contentions are plainly wrong.

This Court has jurisdiction under 28 U.S.C. § 1257(a) for two separate reasons. First, just as in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), jurisdiction exists because the decision below finally resolves a federal law issue, reversal of the state court will preclude any further litigation, and delayed review would erode federal policy. Second, jurisdiction exists because the lower courts' denial of mandamus constitutes a final judgment in that mandamus proceeding.

Respondent's other arguments are equally flawed. First, this Court frequently reviews unpublished state and federal court rulings. Second, the conflict presented here cannot be explained away by reference to the separate choice-of-law clause in the parties' contract, as shown by this Court's decision rejecting a similar argument in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Finally, respondent's implicit concession that the conflict will encourage forum-shopping and impose litigation costs at odds with the goals of the FAA confirms that the Court should resolve the question presented here without delay.

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[1] Petitioners' Rule 29.6 statement is set forth at Pet. ii.

I. This Court Has Jurisdiction.

There are two separate reasons why this Court has jurisdiction here: (A) the Court of Appeal's judgment is a final ruling on a federal law issue that is immediately appealable under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); and (B) the ruling below constitutes a final judgment in a mandamus proceeding.

A. The first of these points is conclusively demonstrated by this Court's decision in *Southland*, which arose in almost the same posture. Here, as in *Southland*, the petitioners challenged a California statute on the ground that the statute is inconsistent with the parties' arbitration agreement and therefore is preempted by the FAA. And here, as in *Southland*, the California court rejected the federal law challenge and stayed arbitration pending further court proceedings.

Southland held that this Court has jurisdiction in this situation. It first set forth the general standard as follows:

> Under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975), judgments of state courts that finally decide a federal issue are immediately appealable when 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . .' In these circumstances, we have resolved the federal issue 'if a refusal immediately to review the state-court decision might seriously erode federal policy.' *Id.*, at 483.

Southland, 465 U.S. at 6. The Court then held that it had jurisdiction under this test because (1) "[w]ithout immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue," which would leave in

effect an unreviewed decision that "the California statute does not conflict with the Federal Arbitration Act" (*id.* at 6); (2) reversal of the state court judgment would terminate the litigation (*id.* at 6-7); and (3) "to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate" (*id.* at 7-8). Each aspect of that ruling is equally applicable in the identical circumstances presented here.

Respondent does not even mention *Southland*, and his reliance instead on *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), is clearly misplaced. *Jefferson* simply did not involve the rule from *Cox* that this Court invoked in *Southland.* In particular, *Jefferson* was not a case where immediate resolution of the federal law issue would have ended the case or was needed to avoid harm to federal policy.

B. This Court also has jurisdiction because the decision below constitutes a final judgment in a mandamus proceeding. "Petitions for writ of mandamus . . . have . . . been seen as distinct lawsuits for purposes of the finality determination." 22 James Wm. Moore, et al., MOORE'S FEDERAL PRACTICE § 406.03(3)(b)(i) (3d ed. 2000). As then-Justice Rehnquist explained in another case in which the California courts had denied a petition for a writ of mandamus, the "petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's [denial]." *Board of Educ. v. Superior Ct.*, 448 U.S. 1343, 1346 (1980) (Rehnquist, J., in chambers). Therefore, then-Justice Rehnquist held, "this Court would in all probability have jurisdiction over the present action." *Id.*

The California Court of Appeal expressly treated the instant matter as a petition for a writ of mandate (Pet. App. 4a) and engaged in plenary review, including final adjudication of the federal law issue (*id.* at 4a-11a). Its ruling denying a writ of

mandate, together with the California Supreme Court's denial of review, therefore constitutes a final judgment in a mandamus proceeding that is within this Court's jurisdiction under § 1257.

II. The Fact That The Opinion Below Is Unpublished Is No Basis For Denying Review.

Respondent argues (at 8-10) that this Court should not grant certiorari because the California Court of Appeal's decision was unpublished. This Court, however, often grants certiorari in cases with unpublished decisions. In fact, in the last Term alone, this Court granted review of two unpublished decisions from the California Courts of Appeal,[2] as well as numerous other unreported rulings.[3] Needless to say, courts cannot shield their decisions from this Court's review by declining to publish them.

Respondent's argument in fact highlights one of the reasons why review should be granted here. The Court of Appeal's conclusion not to publish its decision may reasonably be attributed to that court's view that its decision was required, as a

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[2] See, *e.g.*, *Hunt-Wesson Inc. v. California Franchise Tax Bd.*, unpub'd op (Cal. Ct. App. Dec. 11, 1998), *cert. granted*, 68 U.S.L.W. 3176 (U.S. Sept. 28, 1999) (No. 98-2043); *Martinez v. California Ct. of Appeal*, unpub'd op (Cal. Ct. App. Oct. 16, 1998), *cert. granted*, 68 U.S.L.W. 3039 (U.S. July 20, 1999) (No. 98-7809).

[3] See, *e.g.*, *Glover v. United States*, unpub'd op (7th Cir. July 15, 1999), *cert. granted*, 68 U.S.L.W. 3783 (U.S. June 27, 2000) (No. 99-8576); *Carrillo v. Salmon*, unpub'd op (9th Cir. Nov. 13, 1998), *cert. granted*, 68 U.S.L.W. 3544 (U.S. Feb. 29, 2000) (No. 98-1473); *Carter v. United States*, unpub'd op (3d Cir. June 16, 1999), *cert. granted*, 68 U.S.L.W. 3385 (U.S. Dec. 14, 1999) (No. 99-5716); *Johnson v. United States*, unpub'd op (6th Cir. Apr. 29, 1999), *cert. granted*, 68 U.S.L.W. 3257 (U.S. Oct. 19, 1999) (No. 99-5153); *Slack v. McDaniel*, unpub'd op (9th Cir. July 7, 1998), *cert. granted*, 68 U.S.L.W. 3039 (U.S. July 20, 1999) (No. 98-6322).

matter of *stare decisis*, by the California Supreme Court's ruling in the *Southland* case. Pet. App. 5a-6a. Yet, as our petition showed (at 5), this Court sought to review precisely that ruling but could not because the federal issue was not properly presented there. Here, by contrast, the federal law issue left open by this Court in *Southland* is ripe for resolution.

III. Respondent's Effort To Explain Away The Many Conflicting Decisions Is Unpersuasive.

The petition demonstrated (at 6-13) that the decision below conflicts with rulings from numerous other state and federal courts. Respondent seeks to paper over that conflict by arguing (at 10-16) that the contract's inclusion of a separate choice-of-law provision stating that the contract would be governed by California law means that Prudential agreed that arbitration would be conducted in accordance with California procedural statutes. That argument is wrong for at least three reasons and does not explain away the conflict.

First, neither the trial court nor the Court of Appeal relied on or even cited to the choice-of-law provision. As such, the courts below plainly did *not* hold that Prudential had, through the choice-of-law clause, consented to the application of California procedural law. To the contrary, they held that the California law permitting consolidation was to be applied regardless of the lack of consent (Pet. App. 4a-9a).

Second, respondent's choice-of-law argument is closely analogous to the argument rejected by this Court in *Mastrobuono*. The respondent there argued that the arbitration rules were controlled by the contract's general choice-of-law clause, which said that the contract would be "governed by the laws of the State of New York." *Mastrobuono*, 514 U.S. at 53. In rejecting that argument, the Court held:

> "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of

> the State of New York' to encompass the substantive principles that New York courts would apply . . . . Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration . . . ."

Id. at 63-64. That reasoning is equally applicable here. Although the contract here contains a general choice-of-law clause (in a separate section of the contract), the arbitration clause specifically states that arbitration is to be conducted "in accordance with the commercial arbitration rules of the American Arbitration Association." Pet. App. 19a. It is hornbook law that the specific statement that arbitration will be conducted under the AAA rules trumps the general designation that California law applies to the contract. See, *e.g.*, 5 *Corbin on Contracts* § 24.23 (1998) (citing *Restatement (Second) of Contracts* § 203 (1979)).[4]

Third, respondent's argument runs afoul of this Court's teaching that when the parties to an agreement choose a particular state as the source of governing law, they also incorporate the limitations that federal law imposes on such state law. In *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157 (1982), for example, this Court held that

> "the incorporation of state law does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'"

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[4] See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."); cases cited at Pet. 12-13.

Thus, when the parties here agreed to be governed by California law, they did not adopt California law to the extent that it is preempted by the FAA.

For these reasons, it is not surprising that courts have repeatedly rejected arguments that a contract's general choice-of-law clause should be construed to govern the arbitration process under the FAA. See, *e.g.*, *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000) ("[G]eneral choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators."); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 996-97 (8th Cir. 1998) (court will not interpret choice-of-law clause to trump arbitration provisions unless contract is "abundantly clear" in that respect); *Ferro Corp. v. Garrison Indus.*, 142 F.3d 926, 938 (6th Cir. 1998) ("Most contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases."); *Home Ins. Co. v. New England Reins. Corp.*, 98 Civ. 5772 (JFK), 1999 U.S. Dist Lexis 13421, *18-19 (S.D.N.Y. Aug. 31, 1999) (rejecting argument that choice-of-law clause incorporated state law authorizing consolidated arbitration); *Hyundai Am., Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217 (N.D. Cal. 1998) (same).

In short, the decision below did not and could not rely on the contract's general choice-of-law clause as evidencing an agreement to proceed under California arbitration rules. Thus, respondent's effort to eviscerate the conflict among the courts by relying on that clause is meritless. At bottom, the decision below, like the First Circuit's decision in *New England Energy*, explicitly rests on the notion that "an order not contradicting [the parties'] contractual terms regarding arbitration is 'in accordance with [those] terms'" and thus complies with the FAA. Pet. App. 8a. That reasoning is precisely what many

decisions have rejected in holding that the FAA permits consolidated arbitration only when the arbitration clause authorizes such a process. See, *e.g.*, *Champ v. Siegel Trading Co.*, 55 F.3d 269, 271-76 (7th Cir. 1995), and the other cases cited at Pet. 6-10.

IV. Resolution Of The Conflict Is Vitally Important.

Respondent argues (at 21-23) that the reasons for deciding the question presented by this case are "not compelling." Respondent does not dispute that, as the petition showed (at 14-15), the fact that different courts will reach different results under the same circumstances – some will order classwide arbitration, while others will compel individual arbitration – will encourage forum shopping. Instead, respondent says (at 22) that Prudential cannot complain about such forum-shopping because it drafted the language of the contract. That argument constitutes a *non sequitur* – Prudential plainly never agreed that its FAA-based right to arbitrate under the AAA's rules would depend on who raced to court first, and to which court they went. Nor, in any event, does respondent's argument either negate the adverse impact of such forum shopping on the administration of justice or rebut the fact that, as this Court held in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases."

Respondent also argues (at 22) that allowing courts to order classwide arbitration even where it is not contemplated by the parties' contract will not undermine the goals of the FAA. As the petition showed (at 15-16), however, that argument is refuted by the fact that numerous courts themselves have recognized that classwide arbitration necessarily involves (1) extensive class certification and notice proceedings in court, then (2) a much more complex arbitration process, and then (3)

potential collateral attacks in still further courts – all of which are plainly contrary to the basic purposes of the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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